SUPREME COURT, U. S.

No. 293

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FIORE BUCCIERI, FRANK BUCCIERI, CHRIS CARDI, DOMINICK CARZOLI, ARTHUR COWAN, JOSEPH GAGLIANO, JOSEPH GRIECO, PETER ORI, LENNY PATRICK, ALBERT SARNO, PATSY RICCIARDI and ANTHONY SPILOTRO,

Petitioners,

VS.

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

On Petition For A Writ of Certiorari to the Supreme Court Of Illinois.

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled cause on January 19, 1967.

Citations to Opinion Below

The opinion of the Supreme Court of Illinois is printed in Appendix A hereto, *infra,* App. p. 1, and is reported at 224 N.E.2d 236.

Jurisdiction

The judgment of the Supreme Court of Illinois was entered on January 19, 1967. A timely Petition for rehearing was denied by that Court on March 28, 1967. The jurisdiction of this Court is invoked under Title 28, §1257(3), U.S.C.

Questions Presented For Review

1. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution requires an express provision for notice and hearing in a statute purporting to authorize a legislative investigating commission to seek an enforcement order, from a court, compelling the attendance and testimony of witnesses before the commission.

2. Whether notice of an action to seek such an enforcement order mailed by ordinary mail to each of the petitioners satisfied the requirements of due process of law.

3. Whether the refusal to grant petitioners a hearing on the merits of respondent's application for an enforcement order denied petitioners due process of law.

Constitutional Provision and Statutes Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> • • • No State shall • • • deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 13 of the Illinois Crime Investigating Commission Act, (Ill.Rev.Stat., 1965, Ch. 38, §203-13), provides in pertinent part:

"* * * In case of disobedience to a subpoena, the Commission may invoke the aid of any circuit court of the State in requiring the attendance and testimony of witnesses, and the production of documentary evidence. Any circuit court of the State may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commission, or to produce documentary evidence, if so ordered, or to give testimony touching the matter in question, and any failure to obey such order of the circuit court may be punished by that court as a contempt upon itself. * * *"

Illinois Revised Statutes, 1965, Chapter 63, Section 13.2 provides:

> No person shall be required to testify at a hearing unless two members of the commission are present. No person shall be required to appear at any hearing or testify unless he has been personally served with (a) a copy of this Act and (b) a copy of the law or resolution authorizing the investigation.

Statement of the Case

The action challenged herein was initiated on behalf of the Respondent, by the Attorney General of Illinois, in the Circuit Court of Cook County by the filing of the following "Petition:"[1]

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[1] The Petition contained fifteen counts, each count being directed to an individually named "Defendant." The several counts were identical, with the single exception that each count had appended thereto, as an exhibit, a copy of the "subpoena" allegedly served upon the "Defendant" named therein and a copy of a communication allegedly addressed to the Commission or its Executive Director on behalf of the named "Defendant" following his alleged receipt of the "subpoena." Three "Defendants" did not appear in the Supreme Court of Illinois, and do not appear here.

"Comes now the plaintiff, the Illinois Crime Investigating Commission (hereinafter referred to as the 'Commission'), of the State of Illinois, by William G. Clark, Attorney General of the State of Illinois, its attorney, and complains of the defendants, Fiore Buccieri, Frank Buccieri, Mitchell Caplan, Chris Cardi, Dominick Carzoli, Arthur Cowan, Joseph Gagliano, Joseph Grieco, John Lang, Robert J. McDonnell, Peter Ori, Lenny Patrick, Patsy Ricciardi, Albert Sarno, and Anthony Spilotro, and each of them, individually and collectively, for the following reasons:

Count 1

As to Defendant Fiore Buccieri

"1. That the plaintiff, the Commission herein, was created by an act of the General Assembly of the State of Illinois, approved June 20, 1963, with the powers and duties provided for in Chapter 38, Sections 203-1 through and including 203-17, entitled Illinois Crime Investigating Commission Act (hereafter referred to as the 'Act'), Illinois Revised Statutes, 1965, Volume 1, pages 1666-1668.

"2. That the legislative intent, relative to said Act is set out in Section 1 (Section 203-1) of said Act, and is as follows:

> 'It is the intent of the General Assembly, recognizing the frequent subversion of governmental, political and economic institutions through the influence of organized crime, (a) to set up adequate facilities for investigating and establishing the facts and general background relating to organized crime and to individual crimes insofar as they have a bearing on organized crime, whether the act or intent constituting the same, or both, occurs within or without the State so long as such organized crime or individual crimes affect the public safety, public peace,

public health, public morals, public welfare or public justice of the State; (b) to evaluate the extent to which organized crime exists within the borders of the State, and the degree of efficiency of law enforcement agencies in dealing with it; and (c) to make such facts, general background and evaluation available to the legislative, executive, judicial and administrative bodies and officials of the State, to the end that they may better perform their respective functions in preserving the public safety, public peace, public health, public morals, public welfare and public justice of the State.

'This Act, and the jurisdiction of the Commission created thereby, is not intended to be in derogation of the jurisdiction of any County of the State.'

"3. That pursuant to the provisions of said Act, and particularly Sections 1, 7, 9, 10, and 12 thereof, but not in limitation of same, the Commission did, on to wit November 17, 1965, by a certain "Specific Resolution No. 8" resolve to conduct hearings relative to the subject or subjects specified in said resolution, copy of which said resolution is hereunto attached as Exhibit A of this count, and made a part hereof.

"4. That pursuant to said Act, particularly, Section 13, and said Resolution, a subpoena was duly served upon the defendant, complained of in this count, copy of which said subpoena is attached hereto as Exhibit B of this count, and made a part hereof, to which said subpoena was attached a copy of the Resolution heretofore referred to as Exhibit A, and also attached to said subpoena was a copy of the "Hearings Before Commissions" Act, being Sections 13.1 through 13.5 of Chapter 63, Illinois Revised Statutes, 1965, Volume 2, pages 338-339, copy of which said Act is attached hereto as Exhibit C of this count, and made a part hereof. That said subpoena was duly served upon this defendant, personally, on the date indi-

cated on said subpoena (Exhibit B of this count), requiring the said defendant to appear at the time and place indicated on said subpoena.

"5. That at the time and place indicated in said subpoena, the plaintiff was conducting a public hearing, pursuant to the provisions of the Illinois Crime Investigating Commission Act, Illinois Crime Investigating Commission Specific Resolution No. 8 (Exhibit A of this count), and the "Hearings Before Commissions" Act (Exhibit C of this count). That at said time and place, the Commission was in session, conducting said hearing and was prepared to question said defendant, and did in fact call said defendant, but said defendant did not appear as a witness, nor did said witness testify, as more fully appears in the next paragraph of this count.

"6. That, in fact, the said defendant not only did not appear as a witness, but said defendant did not even appear at said hearing, but through an attorney, said attorney, on behalf of said defendant, filed a certain supposed document with said Commission, which said document has no legal effect, but nevertheless, a copy of said document is attached hereto as Exhibit D.

"7. That the above mentioned subpoena was issued and served upon this defendant pursuant to the provisions of Section 13 of said Act, which said Section also provides that:

> 'In case of disobedience to a subpoena, the Commission may invoke the aid of any circuit court of the State in requiring the attendance and testimony of witnesses, and the production of documentary evidence. Any circuit court of the State may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commission, or to produce documen-

tary evidence, if so ordered, or to give evidence touching the matter in question, and any failure to obey such order of the circuit court may be punished by that court as a contempt upon itself.'

"Wherefore, this defendant, having disobeyed the subpoena of this Commission, it is hereby petitioned by the said Commission that this Court enter an order herein, requiring this defendant to appear before this Commission and to be sworn to answer questions, and to answer all proper questions, at a time and place to be determined by the Court or said Commission.

* * *

"Wherefore, these defendants, and each of them above enumerated in Counts 1 through 15 inclusive, having each disobeyed the subpoena of this Commission, it is hereby petitioned by said Commission, that this Court enter an order herein, requiring these defendants and each of them to appear before this Commission and to be sworn to answer questions, and to answer all proper questions, at a time and place to be determined by the Court or said Commission." (Tr. 3-11)

Notice of the filing of this "Petition" was sent to the Appellants and their attorneys by ordinary mail.

The "Defendants" appeared by counsel and filed the following "Motion To Dismiss Action and Strike Complaint:"

"Come now the following defendants hereto, by their respective Counsel, as indicated:

Fiore Buccieri, by McDonnell and McDonnell, his Attorney;

Frank Buccieri, by John Muldoon, his Attorney;

Chris Cardi and Peter Ori, by John Cogan, their Attorney;

Dominick Carzoli, Albert Sarno and Anthony Spilotro, by Frank G. Whalen, their Attorney;

Arthur Cowan and Lenny Patrick, by John Powers Crowley, their Attorney;

Joseph Gagliano, by Harry J. Busch, his Attorney;

Joseph Grieco, by Bernard McDonnell and Eugene Bernstein, his Attorneys; and

Patsy Ricciardi, by Frank Oliver, his Attorney.

"Said defendants, pursuant to the provisions of Section 45 of the Illinois Civil Practice Act (S.H.A. Chapter 110, Section 45), file and present their objections to the pleading of the plaintiff, and state that said pleading is substantially insufficient in law for the reasons hereinafter set forth.

"Said defendants hereby move:

(a) That the plaintiff's complaint be dismissed; and

(b) In the event of the denial of the motion expressed in sub-paragraph (a), without waiver of said motion, that plaintiff's complaint be stricken.

"As grounds for the motions hereinabove expressed, these defendants show:

"1. The statute cited by plaintiff as its authority for the presentation of its complaint within paragraph 7 of each Count thereof, being Section 13 of the Illinois Crime Investigating Commission Act (S.H.A. Chapter 38, Section 203.13) is offensive to the Constitution of the United States and to the Constitution of the State of Illinois in the following respects:

"(a) Said statute purports to authorize the use of court process for the imposition of obligations upon these defendants, while making no provision for notice to these

defendants. Such procedure constitutes a deprivation of substantial right without due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States and further contrary to the provisions of Article II, Section 2 of the Constitution of Illinois 1870.

"(b) Said statute further serves to deny these defendants due process of law, contrary to the Constitutional provisions above cited, and to deny these defendants the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States, in that it purports to empower the plaintiff arbitrarily to designate persons as to whom normal judicial procedures and safeguards will not apply.

"(c) Said statute is further offensive to the Federal Constitutional provisions above cited and to Article VI, Sections 1 and 2 of the Constitution of Illinois 1870 in that it purports to impart to the plaintiff a directory power over this Court; to relegate this court to the status of an "aid" to the plaintiff; and to deprive the persons sought to be affected by the orders of this Court of standing equal to that of the plaintiff before this Court.

* * *

In due time, the cause came on for hearing on the Motion To Dismiss filed by the "Defendants." Following arguments on behalf of the "Plaintiff" and the "Defendants," the lower court found that it had jurisdiction over the persons of the defendants and over the subject matter, and it ordered:

> "* * * that the Motion to Dismiss Action And Strike Complaint heretofore filed herein on behalf of twelve of the fifteen defendants, be and is hereby overruled and denied.

"It Is Further Ordered that each and everyone of the defendants * * * appear and attend before the Illinois Crime Investigating Commission, plaintiff herein, on Wednesday, April 6, A.D. 1966, at 10:00 A.M. at the Cook County Board Hearing Room, being Room 535 of the County Building, 118 North Clark Street, Chicago, Cook County, Illinois, and from day to day thereafter, until such time as each is excused by the said Commission.

"The Court hereby retains jurisdiction over this cause.

"The Court denies the motion of the Defendants for leave to file an Answer to the Petition of the Plaintiff." (Tr. 88-89)

A "Joint Notice of Appeal" was duly filed, (Tr. 91-92), and thereafter, on March 9, 1966, an appeal bond, staying the proceedings below, was fixed and filed on behalf of each appellant. (Tr. 109)

The Supreme Court of Illinois ruled:

1. That " * * * notice and an opportunity to be heard are essential elements of due process of law," (App. 1, *infra,* p. 2) but that based upon "* * * fundamental rules of statutory construction as laid down by this court from time to time * * * as well as commonplace knowledge that notice and opportunity to be heard are the essence of procedural due process, we hold that the legislature, in enacting section 13, necessarily contemplated and intended that orders to compel obedience to subpoenas issued by the commission could only be entered upon due notice and hearing." (App. 1, *infra,* pp. 3-4).

2. That "While it would appear there is authority from which analogy could be drawn to uphold the validity of mailed notice in a proceeding such as this, * * * we do not reach that point in this case. By making a general appearance, defendants submitted to the jurisdiction of the court and waived the adequacy of the notice served upon them." (App. 1, *infra,* p. 4).

3. " * * * [J]udicial review [of administrative subpoenas] is limited to a consideration of the constitutionality of the statute, whether the contemplated agency proceedings are included within the statutory authority, the reasonableness of the demand and the relevance of the information sought," (App. 1, *infra,* p. 5), and that matters of defense, such as the legality of the investigation based on the claim that the commission was seeking to expose solely for the sake of exposure, should have been raised in the motion to dismiss the "petition" and was not a matter to be raised by answer. "Due process does not require that a party be given multiple opportunities to raise the same question, and when all matters properly reviewable may be raised and heard on a motion to dismiss, there exists no necessity for further pleadings. Defendants' failure to present all reviewable issues in its motion constituted a waiver of those not presented * * * *" (App. 1, *infra,* p. 5-9).

REASONS FOR GRANTING THE WRIT

1. The lack of a statutory provision for notice and an opportunity to be heard.

The action[1] below was commenced pursuant to Section 203-13 of the Illinois Criminal Code, (Ill.Rev.Stat., 1965, Ch. 38, §203-13), which, in pertinent part, provides:

> "* * * In case of disobedience to a subpoena, the Commission may invoke the aid of any circuit court of the State in requiring the attendance and testimony of witnesses, and the production of documentary evidence. Any circuit court of the State may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commission, or to produce documentary evidence, if so ordered, or to give testimony touching the matter in question, and any failure to obey such order of the circuit court may be punished by that court as a contempt upon itself. * * *"

The statute does not contain any provision affording notice or an opportunity to be heard to the person against whom the directory order is sought. The statute, on its face, contemplates an *ex parte* application to and proceeding before "any circuit court of the State." The question presented is thus whether the failure to expressly provide for notice and an opportunity to be heard exposes the statute to the objection that it denies a putative witness due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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[1] The instant proceeding can be characterized as an "action" only to the extent that one party filed a "petition" in a court of record, and obtained an order thereon which adversely affects the rights of the petitioners herein.

Illinois recognizes that notice and the opportunity to be heard are not only essential elements of due process, (*People* v. *Lavendowski,* 329 Ill. 223; *People* v. *Marquis,* 291 Ill. 121; *People* v. *Gale,* 339 Ill. 162; see also, *Simon* v. *Craft,* 182 U.S. 427), but are actually the essence of "procedural due process." See, *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413; *Southern Ry. Co.* v. *Virginia ex rel. Shirley,* 290 U.S. 190; App. I, *infra,* p. 2. Thus, an individual's rights may not be determined, his liabilities may not be adjudicated, without at least a hearing or an opportunity to be heard. *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 423; *Southern Ry. Co.* v. *Virginia ex rel. Shirley,* 290 U.S. 190. A statute which assumes to provide for the adjudication of an individual's rights or liabilities must contain provisions for notice and an opportunity to be heard. *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413; *Southern Ry. Co.* v. *Virginia ex rel. Shirley,* 290 U.S. 190; *Stuart* v. *Palmer,* 74 N.Y. 183.

The absence of an express provision for notice and an opportunity to be heard has been construed as a violation of due process because

> "The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority, be done." *Stuart* v. *Palmer,* 74 N.Y. 183, 188.

Formerly, Illinois had held to this point of view. *People* v. *Marquis,* 291 Ill. 191; *People* v. *Gale,* 339 Ill. 162. For the first time, in this case, Illinois has read a provision calling for notice and an opportunity to be heard into a statute where nothing in that statute suggests that the legislature intended that result. The Due Process Clause would seem to require either an express provision or something from which such a provision could be reasonably

inferred. See, *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 424-25; *Stuart* v. *Palmer,* 74 N.Y. 183, 188. Certiorari should be granted herein to determine whether such provisions can be read into the statute where nothing therein suggests that the legislature so intended.

2. The Sufficiency of Mailed Notice.

Reading a requirement of notice into a statute where it does not otherwise appear, creates a multitude of problems. What type of notice was intended by the legislature when they have been silent on the subject? Is notice by registered mail sufficient? Is personal service of notice required? See, *e.g., Chicago & Alton Ry.* v. *Smith,* 78 Ill. 96, 99. What about substituted service? Generally, Illinois holds that where no valid reason exists why personal service of notice cannot be made, constitutional notice can only be given by personal service. *Chicago & Alton Ry.* v. *Smith,* 78 Ill. 96; *cf. People* v. *Simon,* 176 Ill. 165, 52 N.E. 910, 914; Compare, *Jacobs* v. *Roberts,* 223 U.S. 261; *Pennoyer* v. *Neff,* 95 U.S. 714, 726-27. Thus, even if it is proper to read a provision for notice and hearing into this section of the Illinois Crime Investigating Commission Act, the problem remains whether the notice[2] that was given to the Appellants by ordinary mail was constitutionally sufficient.

The Supreme Court of Illinois held that Petitioners waived any possible objection to the method of service by their general appearances and refused to consider the issue. This disposition overlooks the nature of Petitioners' entry into the case. Petitioners alleged that the entire proceeding was unconstitutional, that the lower court did not and

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[2] The notice referred to here is the actual securing of personal jurisdiction over petitioners.

could not have jurisdiction of their persons because of that constitutional infirmity. Their specific allegations of unconstitutionality was based on the absence of a provision in the statute for bringing them into court in the first instance. *Cf. Mitchell* v. *Jacobs,* 17 Ill. 235. Under this circumstance, the issue of the propriety of mailed notices should have been reached.

Insofar as the decision of the Illinois Supreme Court seems to give approval to service by ordinary mail, that decision represents a grave departure from settled principles of procedural due process. Compare, *Pennoyer* v. *Neff,* 95 U.S. 714. The cases on which the Illinois Court bases its *dicta* are clearly distinguishable, and the distinguishing factor highlights the importance of an authoritative determination as to the type of service permissible under the Constitution in cases such as this. Both *Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F.2d 692, and *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board,* 122 F.2d 450, involved enforcement proceedings arising out of matters pending before an administrative agency. The parties had appeared before the agency; they had joined issue on the merits of the questions before the agency; they had participated in its proceedings prior to the applications for the enforcement orders. The enforcement action was truly ancillary to the agency's proceedings. Here, however, Petitioners had not partaken in any proceedings before the Commission. The enforcement action was not ancillary to any proceedings before the Commission to which Petitioners were a part. The enforcement action here was the actual initiation of the proceeding before the Commission.

3. Denial of a Hearing.

Following denial of their motion to dismiss, the trial court ruled that Petitioners were not entitled to answer the Respondent's "petition" and denied them a hearing on the factual issues asserted by the "petition." The Supreme Court of Illinois ruled, as stated above, that Petitioners were entitled to a hearing only as to "a consideration of the constitutionality of the statute, whether the contemplated agency proceedings are included within the statutory authority, the reasonableness of the demand and the relevance of the information sought." (App. I, *infra*, p. 5.) The Court did not rule directly on Petitioners' contention that the action of the trial court foreclosed them from challenging Respondent's assertion that they were in fact the persons named in the subpoenas and that they had in fact been served with the subpoenas in accordance with law.[3] The holding of the Illinois Supreme Court thus denies persons against whom enforcement proceedings are initiated the right to be heard in their claim that the subpoenas to be enforced do not meet with mandatory standards previously established by the Illinois legislature, or embodied within the common law. In short, because a putative witness is not entitled to a hearing on these issues according to the decision here sought to be reviewed, an individual is not entitled to claim that he is not the person named in or served with a sub-

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[3] Illinois law requires that a subpoena issued by the Commission and served upon a prospective witness be accompanied by a copy of the resolution authorizing the investigation to which the witness has been subpoenaed, and a copy of the statute itself, which describes many other rights and privileges of such witnesses. (Ill.Rev.Stat., 1965, ch. 63, sec. 13.2) Illinois law further provides that witnesses so subpoenaed be paid "witness fees" in advance. Ill.Rev.Stat., 1965, Ch. 63, sec. 6; *Bonner* v. *People,* 40 Ill. App. 628; *People* v. *Healey,* 139 Ill. App. 363.

poena in the first instance, that the subpoena was not accompanied by those documents which it is required by law to be accompanied by, or that he has not been tendered the required witness fees. These portions of the "petition" alleging facts to this effect[4] must be taken as alleged. Petitioners, and others similarly situated, are not entitled to contest these allegations, or, at the very least, to have them affirmed, under oath, in open court, in the presence of Petitioners, where they may be tested by the traditional methods of cross examination. See, *Pointer* v. *Texas,* 380 U.S. 400; *Douglas* v. *Alabama,* 380 U.S. 415.

Conclusion

For the above and foregoing reasons we respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in this case.

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[4] The "petition" herein did not even allege that Petitioners had been tendered the required witness fees.